

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CARY E. BERGER and K.C.
CHARLES, INC., a Washington
corporation,

Plaintiffs,

vs.

COMCAST OF PENNSYLVANIA/
WASHINGTON/ WEST VIRGINIA,
LP, a Colorado limited partnership
corporation,

Defendant.

NO. CV-08-320-LRS

**AMENDED
MEMORANDUM OF DECISION¹**

A bench trial was conducted in this matter on October 3, 2011. The following represents the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a)(1).

JURISDICTION

This action was removed to this court from Stevens County Superior Court in October 2008 pursuant to the Class Action Fairness Act (CAFA), 28 U.S.C. §1332(d). CAFA vests federal courts with original jurisdiction over class actions in which: (1) the plaintiffs' proposed class consists of 100 or more members; (2) any member of the proposed class is a citizen of a state different from any defendant (minimal diversity); and (3) the amount in controversy is \$5 million or

¹ This Amended Memorandum Of Decision corrects several typographical errors. It does not contain any substantive changes.

1 more, aggregating all claims and exclusive of interests and costs.²

2 With the consent of counsel for Plaintiff, the class claims were stricken by
3 way of an “Order Re Motion To Dismiss” (ECF No. 18) filed July 2, 2010. Recent
4 authority from the Ninth Circuit Court of Appeals suggests this voluntary
5 dismissal of the class claims did not eliminate the court’s subject matter
6 jurisdiction under the CAFA, notwithstanding the fact that minimal diversity no
7 longer exists and there is not complete diversity as required under 28 U.S.C. §
8 1332(a). *United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied*
9 *Industrial & Service Workers International Union, AFL-CIO, CLC v. Shell Oil*
10 *Company*, 602 F.3d 1087 (9th Cir.2010) (post-removal denial of class certification
11 does not divest the court of subject matter jurisdiction under the CAFA;
12 jurisdiction is determined at the time of removal).

14 FINDINGS OF FACT

15 Plaintiffs Carey E. Berger and K.C. Charles, Inc., are owners of six
16 contiguous parcels of real property along and near Jergens Road in Stevens
17 County, State of Washington. Berger is K.C. Charles’s sole shareholder.

18 Inland Power & Light Company (Inland Power) erected and owns electrical
19 power infrastructure, including power poles capable of carrying
20 telecommunications lines, throughout Stevens County, Washington. Inland Power
21 owns power poles located on the Berger/Charles property.

22 Defendant Comcast contracted with Reel Cable Services to install 13 aerial
23 miles of fiber optic cable in Stevens County beginning in February 2005. That
24 contract included installation of cable on Inland Power’s poles on the

26
27 ² The court is satisfied that the “home state” exemption mandating
28 abstention from the exercise of jurisdiction, 28 U.S.C. § 1332(d)(4), did not apply
at the time of removal.

1 Berger/Charles property.

2 In 1974, Inland Power obtained an easement from Plaintiffs' predecessors
3 in interest, Hal and Marjorie Norrie. This "Right-Of-Way Easement" granted to
4 Inland Power "and to its successors and assigns, the right to enter upon the lands
5 of the undersigned . . . and to construct, operate, and maintain, and to reconstruct,
6 rephase, alter, repair and energize, under, on, and/or above the above-described
7 lands and/or in, under or upon all streets, roads or highways abutting said lands, an
8 electric transmission or distribution line or system." This easement has not been
9 recorded.

10 The two most easterly parcels of the Berger/Charles property (Parcel Nos.
11 5119900 and 5119800) are not expressly covered by the legal description
12 contained in the 1974 easement.

13 Since 1974, in addition to electrical power transmission lines, there has
14 been telecommunications (telephone) wire on the Inland Power poles crossing the
15 Berger/Charles property. Inland Power has consistently licensed
16 telecommunications companies to install lines on their poles continuously since
17 the 1974 easement.

18 On November 20, 2002, Inland Power and TCI American Cable Holdings,
19 L.P., d/b/a AT&T Broadband entered into an "Agreement for Joint Use of Poles."
20 The Agreement "covers all poles . . . in areas where both parties provide service"
21 and allows the licensee to "use the poles for the purpose of transmission of
22 signals."

23 Defendant Comcast is the successor of AT&T Broadband and maintains its
24 licenses and contracts, including the Inland Power "Agreement for Joint Use of
25 Poles."

26 Defendant's fiber optic cable occupies the same position on the Inland
27 Power poles as the telecommunications (telephone) wire previously occupied.

28 Inland Power transmission lines and telecommunications (telephone) wire

1 were installed on Plaintiffs' property prior to Plaintiffs' purchase of the property in
2 1989.

3 The telecommunications (telephone) wire on the Inland Power poles existed
4 in the same position where Defendant's fiber optic cable is located for over six
5 years after Plaintiffs purchased the property.

6 7 **DISCUSSION**

8 The scope of an express easement is a mixed question of fact and law.
9 "What the original parties intended is a question of fact and the legal consequence
10 of that intent is a question of law." *Sunnyside Valley Irrig. Dist. v. Dickie*, 149
11 Wn.2d 873, 880, 73 P.3d 369 (2003). "The primary objective when determining
12 the scope of an easement is to effectuate the intent of the parties who created it."
13 *Wilson & Son Ranch, LLC v. Hintz*, 162 Wn.App. 297, 306, 253 P.3d 470, 475
14 (2011). "When there is specific, unambiguous language creating an easement,
15 that language **may** be determinative of the permitted uses and, thus, the parties'
16 intent as to its scope." *Id.* (Emphasis added). "If the language creating the
17 easement is ambiguous regarding permissible uses . . . the parties' intent may be
18 determined by certain factors outside the terms of the grant." *Id.*, citing *Logan v.*
19 *Brodrick*, 29 Wn.App. 796, 799-800, 631 P.2d 429 (1981). "When utilizing
20 extrinsic evidence to determine the scope of an easement, 'we look to the
21 intentions of the parties connected with the original creation of the easement, the
22 nature and situation of the parties subject to the easement, and the manner in
23 which the easement has been used and occupied.'" *Id.*, quoting *Logan*, 29
24 Wn.App. At 799 (holding that increased use of right of way easement was
25 foreseeable and intended by original parties and did not exceed the scope of the
26 easement).

27 "The law assumes parties to an easement contemplated changes in the use
28 of the easement that may not have existed at the time of the grant." *Logan*, 29

1 Wn.App. at 800. "The law assumes parties to an easement contemplated a normal
2 development under conditions which may be different from those existing at the
3 time of the grant. [Citations omitted]. Normal changes in the manner of use and
4 resulting needs will not, without adequate showing, constitute an unreasonable
5 deviation from the original grant of the easement." *Id.* at 801.

6 In its "Order Denying Plaintiffs' Motion For Partial Summary Judgment"
7 (ECF No. 67), filed September 8, 2011, this court found the 1974 easement
8 ambiguous as to whether fiber optic cable is a permissible use. It was for this
9 reason that summary judgment was denied and trial was held in order to consider
10 extrinsic evidence. Upon further review and consideration, the court concludes
11 the easement is not ambiguous.³ Nevertheless, the court concludes fiber optic
12 cable use is permissible within the terms of the easement pursuant to the principle
13 of apportionment. While the court recognizes the Washington Supreme Court has
14 not explicitly addressed the apportionability of easements in gross⁴, the
15 undersigned concludes the state supreme court would recognize that principle and,
16 in fact, Washington courts have already implicitly recognized that principle by
17 virtue of the language quoted above from the decisions of the court of appeals in
18 *Hintz and Logan*.

19 The apportioning of an easement in gross consists in so dividing it as to
20 produce independent uses or operations. When an easement in gross is created by
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23 ³ The court retains the power to change the matters adjudicated at any time
24 before entry of final judgment. *St. Paul Fire & Marine Ins. Co. v. F.H.*, 55 F.3d
1420, 1425 (9th Cir. 1995).

25 ⁴ An easement in gross is not appurtenant to any estate in land or does not
26 belong to any person by virtue of ownership of estate in other land. It is a mere
27 personal interest in or right to use land of another. "An easement in gross directly
28 benefits one person, an easement appurtenant benefits a particular piece of
property." *M.K.K.I., Inc. v. Krueger*, 135 Wn.App. 647, 655, 145 P.3d 411 (2006).

1 conveyance, apportionability depends upon the intention of the parties to the
2 conveyance. Restatement (First) of Property §493 (1944). The 1974 easement
3 was for the benefit of Inland Power and its “assigns.” The easement restricts itself
4 to an “electric transmission or distribution line or system” which, on its face, is
5 seemingly limited to electric power poles, transformers, and electric power lines.
6 There is no mention of telecommunications. In *Marcus Cable Associates, L.P.*
7 *d/b/a Charter Communications v. Krohn*, 46 Tex. Sup. Ct. J. 167, 90 S.W.3d 697
8 (2002), the Texas Supreme Court held this language did not permit cable
9 television lines to be strung across the plaintiffs’ land. According to the court,
10 “[w]hile cable television may utilize electrical impulses to transmit
11 communications . . . television transmission is not a more technologically
12 advanced method of delivering electricity.” *Id.* at 705. In a footnote, it observed
13 that in recent years, many telecommunications providers, including cable-
14 television operators, had moved toward fiber-optics cables that use light lasers,
15 rather than electrical impulses, to transmit communications over their lines. *Id.* at
16 n. 2. The lone dissenting justice opined that he would hold the easement could be
17 apportioned or divided with the cable provider, based on the development of cable
18 television since the easement was granted in 1939, and because the cable
19 provider’s use of the easement would not impose any greater burden on the
20 servient estate. *Id.* at 711-12. The dissenting justice conceded that in 1939 when
21 the easement was granted, the grantors were thinking about electric power and not
22 an electric television cable signal, even though both are electric. *Id.* at 708. He
23 pointed out, however, that “a use that is within the language of an easement as it
24 has come to be understood with changes in technology is not prohibited simply
25 because it was not part of the parties’ original thinking” and therefore the question
26 was “whether a cable carrying an electric television signal to various users is ‘an
27 electric transmission and distribution line or system.’” *Id.* He concluded the
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1 answer was “yes” because:

2 A television cable is a “line.” A television signal is “electric,”
3 assuming as the Court does, that the cable is not fiber optic
4 **(although even if the cable were fiber optic, the signal would
still start out electric at the transmitter and end up electric at
the receiver).**

5 *Id.* at 709 and n. 5 (emphasis added).

6 The dissenting justice added that the majority decision stood alone “in the
7 nation athwart the path to providing cable television and related services to rural
8 areas” and that it directly conflicted with the decision of the Supreme Court of
9 Ohio in *Centel Cable Television Co. v. Cook*, 58 Ohio St.3d 8, 567 N.E.2d 1010,
10 1015 (1991), which held that an easement “for a line for the transmission and/or
11 distribution of electric energy thereover, for any and all purposes for which
12 electric energy is now, or may hereafter be used” allowed for a cable television
13 line. *Id.* at 711. He opined that the easement in *Centel Cable* only provided
14 expressly what the law implied in the easement before the Texas Supreme Court in
15 *Marcus Cable*: “that ‘electric transmission and distribution’ includes all purposes
16 for which electric transmissions are now or may hereafter be used, uses made
17 possible only by subsequent technological developments.” *Id.*

18 It is true that in 1939, cable television did not exist and so the parties to the
19 easement in *Marcus Cable* clearly were not thinking about cable television. Cable
20 television did exist in 1974 when the easement at bar was granted, although its
21 availability and use was not nearly as widespread as it is today. See the National
22 Cable & Telecommunications website at www.ncta.com regarding the history of
23 cable television. Whether anybody had cable television in rural Stevens County in
24 1974 is a question for which the court does not have an answer. Plaintiffs contend
25 that because cable television existed in 1974, the omission of any reference in the
26 easement to telecommunications in general, and cable television specifically,
27 means the parties intended to exclude those uses. The Norries did not testify and
28 so no one knows whether they intended to include or exclude telecommunications

1 in general, and cable television specifically, or whether they even gave it any
 2 thought in 1974. As the dissenting justice in *Marcus Cable* stated, however, what
 3 the Norries were thinking or not thinking is “not the question.” 90 S.W.3d at 708.
 4 “The scope of the easement is measured by the parties’ intent as expressed in the
 5 words used, broadened by changes in the manner, frequency, and intensity of the
 6 intended use that are due to technological advances and do not unreasonably
 7 burden the servient estate.” *Id.*, citing Restatement (Third) Of Property
 8 (Servitudes) §§4.1 and 4.10 & cmt. a (1998). Washington law is in accord. “The
 9 law assumes parties to an easement contemplated changes in the use of the
 10 easement that may not have existed at the time of the grant.” *Logan*, 29 Wn.App.
 11 at 800. “The law assumes parties to an easement contemplated a normal
 12 development under conditions which may be different from those existing at the
 13 time of the grant. [Citations omitted]. Normal changes in the manner of use and
 14 resulting needs will not, without adequate showing, constitute an unreasonable
 15 deviation from the original grant of the easement.” *Id.*

16 This court agrees with the dissenting justice in *Marcus Cable* that “electric
 17 transmission and distribution” includes all purposes for which electric
 18 transmissions are now or may hereafter be used, including uses made possible only
 19 by subsequent technological developments. Electricity is used in transmitting
 20 television signals over a fiber optic cable in that the signal starts out electric at the
 21 transmitter and ends up electric at the receiver. An optical transmitter converts an
 22 electrical signal into an optical signal to send into the optical fiber, a cable
 23 containing bundles of multiple optical fibers, and an optical receiver recovers the
 24 signal as an electrical signal. This is a use within the language of the 1974
 25 easement as it has come to be understood with changes in technology.⁵ Plaintiffs
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27 ⁵ Inland Power has its poles on the Plaintiffs’ property pursuant to the
 28 easement. Inland Power’s licensing of its poles is derived from the easement.

1 note that in September 1996, they granted to Inland Power a Right-Of-Way
2 Easement for the installation of additional power poles and lines to provide power
3 to the residence at 5685 Jergens Road, and that this easement, as contrasted with
4 the 1974 easement, provided Inland Power with express authorization to “license,
5 permit, or otherwise agree to the joint use or occupancy of the line or system by
6 any other person, association or corporation, for electrification, telephone,
7 television, or communication needs.” (Plaintiffs’ Trial Ex. 6). The existence of
8 this later easement does not alter the court’s analysis as to the apportionability of
9 the 1974 easement, additionally so in light of the fact that cable television and the
10 use of fiber optic cable for telecommunication purposes had become very
11 widespread by 1996.

12 The extrinsic evidence supports the court’s conclusion regarding the
13 apportionability of the 1974 easement. Telecommunications (telephone) wire was
14 hanging from the power poles in 1974, the same year the easement was granted,
15 and remained hanging there until 1995 when Plaintiffs negotiated an easement to
16 have that wire buried underground. Cable television is a form of
17 telecommunications. The manner in which the easement has been used and
18 occupied is a factor considered in determining the scope of an easement.

19 The stringing of the fiber optic cable on the poles does not impose a greater
20 burden on the Plaintiffs’ property (the servient estate). The cable is strung along
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22 Plaintiffs note that pursuant to the pole agreement, Inland Power, as licensor,
23 “does not warrant or assure to Licensee any right-of-way privilege or easements.”
24 Plaintiffs also note there are other provisions requiring the licensee to obtain
25 insurance and furnish a bond, and to indemnify Inland Power for losses and
26 liabilities resulting from the licensee’s use of the poles. These provisions are
27 intended to protect Inland Power, but they are not inconsistent with an
28 understanding that Inland Power has the ability to license the use of its poles for
compatible uses within the scope of the easement. The pole agreement did not
require Defendant, the licensee, to obtain its own easement.

1 the power poles in the same location where the telecommunications (telephone)
 2 wire was previously located.⁶ Plaintiffs speculate about a greater burden, but no
 3 evidence was presented that there has actually been an additional burden (i.e.,
 4 Comcast trucks being driven across Plaintiffs' land, gates left open allowing
 5 livestock to run loose, etc.). The court has no reason to believe the servicing of
 6 Defendant's cable imposes any greater burden than the servicing of Inland
 7 Power's poles and lines already imposes.

8 It is acknowledged that the 1974 easement does not cover the two most
 9 easterly parcels of Plaintiffs' property (Parcel Nos. 5119900 and 5119800). These
 10 parcels, however, were at one time owned by the Norries in common with the
 11 other parcels that are expressly subject to the 1974 easement. (Defendant's Trial
 12 Ex. 109).⁷ A prescriptive easement arises where there has been: (1) use adverse to
 13 the owner of the servient land; (2) use that is open, notorious, continuous, and
 14 uninterrupted for 10 years; and (3) knowledge of such use by the owner at a time
 15 when he was able to assert and enforce his rights. *810 Properties v. Jump*, 141
 16 Wn.App. 688, 700, 170 P.3d 1209 (2007). Possession is adverse if the claimant
 17 uses the property as if it were his own, without regard for the claims of others,
 18 without asking permission, and under a claim of right. *Id.*, citing *Malnati v.*
 19 *Ramstead*, 50 Wn.2d 105, 108, 309 P.2d 754 (1957). "Hostile use of real property
 20 by an occupant or user does not import ill will, but imports that the claimant is
 21 possessing or using it as owner, in contradistinction to possessing or using the real
 22 property in recognition of or subordinate to the title of the true owner." *Id.*,

23
 24 ⁶ Plaintiffs' April 1995 easement with U.S. West which provided for
 25 removal of its aerial telephone wire and burial of it underground does not
 26 constitute an abandonment of **Inland Power's** easement pursuant to which it
 licensed use of its poles to Defendant. (Plaintiffs' Trial Ex. 5).

27 ⁷ It appears the Norries acquired these parcels in 1976 which was
 28 subsequent to the 1974 easement.

1 quoting *Malnati*, 50 Wn.2d at 108.

2 The court concludes Inland Power obtained a prescriptive easement with
3 regard to the easterly parcels. The record establishes that its poles and power lines
4 were on those parcels in 1974, if not earlier, and they have remained there to this
5 day. This use has been open, notorious, continuous and uninterrupted for over 10
6 years. It has been adverse, not permissive, manifested by the fact that the 1974
7 easement does not pertain to the easterly parcels and the Norries presumably knew
8 that when they acquired those parcels in 1976. There is no evidence that Inland
9 Power ever asked for permission to place its poles and lines on these parcels.
10 Inland Power exercised dominion as a true owner of an easement would.⁸

11 “When an easement in gross is created by prescription, the question of its
12 apportionability is decided in light of the reasonable expectation of the parties
13 concerned in its creation as inferred from the nature of the use by which it was
14 created.” Restatement (First) of Property §493 (1944). The nature of the use
15 which created the prescriptive easement is an electric transmission and distribution
16 system which includes electric power poles, transformers, and power lines.
17 Telecommunication (telephone) wire hung from those same power poles from
18 1974 to 1995. Cable television is a form of telecommunication. Cable television
19 fiber optic cable being strung on Inland Power’s poles was a reasonable
20 expectation of the parties as inferred from the use of the poles not only for electric
21 transmission lines, but also for telecommunications (telephone) wire. Inland
22 Power’s prescriptive easement with regard to the easterly parcels is also
23 apportionable. Pursuant to its prescriptive easement, Inland Power could and did

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27 ⁸ Plaintiffs’ April 1995 easement with U.S. West also did not abandon
28 Inland Power’s prescriptive easement.

1 license the use of its poles on these parcels.⁹

2
3 **CONCLUSIONS OF LAW**

4 Inland Power has a valid easement by conveyance over four of the six
5 parcels of Plaintiffs' property at issue (the 1974 easement), and a prescriptive
6 easement over the other two easterly parcels (Nos. 5119900 and 5119800).

7 Both of these exclusive easements in gross are apportionable to allow for
8 the stringing of fiber optic cable on Inland Power's poles located on Plaintiffs'
9 property.¹⁰ This is a proper independent use which has been licensed by Inland
10 Power and does not impose a greater burden on the Plaintiffs' property (the
11 servient estate).

12 The presence of Defendant's fiber optic cable on Inland Power's poles
13 located on Plaintiffs' property does not constitute a trespass upon Plaintiffs'
14 property.

15 Accordingly, the District Executive is **DIRECTED** to enter judgment for
16 Defendant. Plaintiffs' Motion For Order Certifying Issue Of State Law To
17 Washington Supreme Court (ECF No. 82) is **DENIED**. This file shall be
18 **CLOSED**.

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24 ⁹ John Francisco of Inland Power testified that Inland Power's pole
25 agreements are not specific to any geographic area and pertain to any pole within
26 its system.

27 ¹⁰ An exclusive easement in gross gives the owner the sole privilege of
28 making the uses authorized by it. It is apportionable so long as the uses fall within
the specifications of the grant. Restatement (First) of Property §493 (1944).

